IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1938.

No. 715

KIM YOUNG,

Appellant,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

Appeal From the Appellate Department of the Superior Court of the State of California.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

Foreword.

The record does not disclose whether appellant is a citizen of the United States. This appeal is not predicated upon any asserted abridgment of the privileges or immunities of a citizen of the United States as guaranteed by the Fourteenth Amendment; only "due process of law" is involved.

Appellant's brief contains no specification of assigned errors, and the "Statement of the Case" contains what counsel for appellant seek to infer from the evidence introduced, rather than a statement of the facts themselves. Appellee has therefore undertaken to set forth in this brief a statement of the facts as they appear in the engrossed

statement in the record on appeal from the Municipal Court to the Appellate Department of the Superior Court [R. 1], and a statement of what appellee believes are the issues of law presented by such facts.

Statement of the Case.

On March 17, 1938, on a public sidewalk adjacent to the Shrine Auditorium, in the City of Los Angeles, the appellant distributed handbills to pedestrians upon said sidewalk [R. 2], which handbills read as follows:

"Back from . . . . . .
War-Torn Spain
Captain
HANS AMLIE
Commander Lincoln Battalion
Brother of Congressman Amlie
JAY ALLEN
War Correspondent Expelled From
Rebel Spain
PEPI JUNEDA
Famous Spanish Dancer
PILAR ARCOS
Spanish Actress and Singer
Chairman, LILLIAN HELLMAN
Screen Writer and Playwright
TRINITY AUDITORIUM
847 So. Grand Ave.
March 21 - - - - - 8:00 P.M.
Admission 25c and 50c
AUSPICES: FRIENDS LINCOLN BRIGADE
333 W. 2nd St. - - - - - MI. 7296"

[R. 4.]

Appellant had at the same time and place more than 300 handbills of the same type and nature as the foregoing, which he was proceeding to distribute to persons on said sidewalk. [R. 4.]

The opinion rendered in the court below described them as "colored cards, three and a half by five and a half inches in size." [R. 5.]

A. Comment on Appellant's Statement of the Case

Appellee respectfully submits that appellant is in error in stating, at page 3 of his brief, that:

> "The handbill announced a meeting for discussion of the war in Spain."

At most, the handbill, or card, simply stated that at the place mentioned therein certain persons would appear. It contained no statement as to what was to take place. The only inference that could possibly be drawn is that there would be an entertainment. The handbill was simply a commercial advertisement calculated to procure the attendance of the public at 25c and 50c admission. Nothing contained therein had any political significance or indicated that political affairs would be discussed at the Trinity Auditorium on that date.

As to appellant's statement, at page 3 of his brief, that:

> "There was no evidence that appellant had littered the streets, or that anyone else had done so, the evidence only being that at the time the appellant was in the process of distributing about 300 of these handbills,"

it seems incredulous that the distribution of *over* 300 of these handbills to pedestrians could be accomplished without the street being littered with discarded handbills.

Statement of the Questions of Law Involved.

Appellant, under two points, simply makes the broad assertion that his conviction was without due process of law, in that there was (1) a "violation of his right of freedom of speech and of the press," and (2) "no evidence of any wrongful act." Appellant has not undertaken to point out, in any degree of particularity, how, under the facts of this case, his constitutional right to due process of law has been violated, as he so broadly asserts.

Appellee believes that the questions of law involved may be summarized as follows:

1. Is a person, duly and regularly convicted of violating a city ordinance prohibiting the distribution of handbills to pedestrians upon the public streets, deprived of his liberty without due process of law on the ground that such ordinance interferes with freedom of speech and freedom of the press?

2. Is freedom of speech and of the press under the provision of the Fourteenth Amendment prohibiting the states from depriving a person of his liberty without due process of law subject to the same restrictions under the police power of the state as is any other liberty of action protected under the due process clause?

3. May a person convicted of violating a statute urge that such statute is unconstitutional as being in violation of the freedom of the press where such right is not shown by the record to be involved?

ARGUMENT.

Summary of Argument.

1. The validity of a statute as depriving a person of liberty or property without due process of law is determined by its reasonableness as a measure under the police power of the state. Whether such statute abridges the privileges and immunities of citizens of the United States is another question independent of due process of law and is not involved in this case.

2. The ordinance prohibiting the distribution of handbills to pedestrians upon the public streets of the City of Los Angeles is a reasonable exercise of the police power of the state.

a. Since abridgment of free speech is not the end sought to be attained by the ordinance, any interference with such right is incidental and does not make the ordinance void.

b. Since the object of the ordinance is not censorship or the restriction of the right of free speech, the reasonableness of the ordinance is not to be determined by the rule of "Clear and Present Danger".

c. It is beside the issue whether other means might be employed to prevent the littering of the city streets.

d. Since the ordinance is not a censorship measure, it is not subject to the criticism made of the ordinances involved in *Hague v. C. I. O.* and *Lovell v. City of Griffin.*

3. By reason of the nature of the contents of the handbill, freedom of the press is not involved in this case.

POINT I.

The Validity of a Statute as Depriving a Person of Liberty or Property Without Due Process of Law Is Determined by Its Reasonableness as a Measure Under the Police Power of the State. Whether Such Statute Abridges the Privileges and Immunities of Citizens of the United States Is Another Question Independent of Due Process of Law and Is Not Involved in This Case.

Appellant does not complain of the regularity of the judicial process by which he was convicted. His attack is directed solely to the constitutionality of the ordinance which he was found guilty of violating. His claim of lack of due process rests upon the contention that the ordinance deprives him of his right of free speech and freedom of the press, and that the state is without power to prohibit the act for which he was found guilty. This presents a question different from that arising out of a claim that the ordinance is void as abridging a privilege or immunity of a citizen of the United States.

New York ex rel. Bryant v. Zimmerman (1928); 278 U. S. 63, 72.

The prohibition against the states contained in section 1 of article XIV is threefold. They are prohibited (1) from abridging the "privileges or immunities of citizens of the United States"; (2) from depriving "any person of life, liberty, or property, without due process of law"; (3) from denying "to any person within its jurisdiction the equal protection of the laws".

Only a citizen of the United States may urge that a state law contravenes the first prohibition. This is pointed out in *Hague v. Committee For Industrial Organization*

(June 5, 1939), 83 Adv. Op. L. Ed. 928; at page 939, in the opinion delivered by Mr. Justice Stone.

If it be conceded, as stated by Mr. Justice Stone, at page 939 of the *Hague* case (83 Adv. Op. L. Ed.), "that freedom of speech and of assembly for any lawful purpose are rights of personal liberty secured to all persons, without regard to citizenship, by the due process clause of the Fourteenth Amendment," it nevertheless does not follow that under the due process clause a non-citizen may urge that the right of free speech thereby secured to him is the right of free speech secured to a citizen of the United States by the privilege and immunity clause of the Fourteenth Amendment. Nor may a non-citizen urge that because a state statute violates the privilege of free speech of a citizen of the United States it violates the right of free speech afforded non-citizens by depriving them of their liberty without due process of law.

The free speech of a citizen, that is, freedom of criticism and discussion concerning public matters and public officials, which is a political right, is certainly different from freedom of speech constituting an essential element of liberty of action secured to all persons by the due process clause of the Fourteenth Amendment. In the case of the claim that a statute is repugnant to the due process clause, the test is the reasonableness of the statute in restricting or curtailing liberty of action in the exercise of the police power of the state, and this is true even where the asserted lack of due process in limiting personal action involves the denial of free speech.

Gitlow v. New York (1925), 268 U. S. 652, 668;
Whitney v. California (1927), 274 U. S. 357, 371;
Fiske v. Kansas (1927), 274 U. S. 380, 387;

See, also:

New York ex rel. Bryant v. Zimmerman (*supra*), 278 U. S. 63, 72.

Therefore, under the due process clause, liberty or freedom of speech is to be tested by the same rules governing restraints upon other liberties of action, such as the right to contract or engage in particular trades or callings, or to become a member of a party or association, or to own property.

POINT II.

The Ordinance Prohibiting the Distribution of Handbills to Pedestrians Upon the Public Streets of the City of Los Angeles Is a Reasonable Exercise of the Police Power of the State.

The section of the ordinance (Los Angeles Municipal Code) directly involved in this case, together with related sections, clearly demonstrates that what is prohibited is simply the distribution of handbills, dodgers, etc., to pedestrians on the streets or in places and under circumstances reasonably certain to result in littering the streets

Section 28.00 is as follows:

> "'Handbill' shall mean any handbill, dodger, commercial advertising circular, folder, booklet, letter, card, pamphlet, sheet, poster, sticker, banner, notice or other written, printed or painted matter calculated to attract attention of the public."

Section 28.01 reads as follows:

> "No person shall distribute any handbill to or among pedestrians along or upon any street, sidewalk or park, or to passengers on any street car, or throw, place or attach any handbill in, to or upon any automobile or other vehicle."

Section 28.02 of the Code relates to distribution on private premises, and reads as follows:

> "No person shall distribute, deposit, throw, place or attach any handbill to, in or upon any porch, yard, steps or mail-box located upon any premises not in the possession of or under the control of the person distributing the said handbill, which premises has posted thereon in a conspicuous place, a sign of at least twelve square inches in area bearing the words 'No advertising', unless the person distributing the handbill has first received the written permission of the person occupying or having possession of such premises authorizing him so to do."

Another provision which sheds light upon the interpretation of section 28.00 is subdivision (j) of section 42.00 (concerning soliciting on streets), which reads as follows:

> "(j) Nothing in this section contained shall be applicable to or prohibit the sale or offering for sale or the possession, control or custody of newspapers, magazines, periodicals or printed matter commonly sold or disposed of by newsboys and news venders, or shall be applicable to or prohibit persons engaged in the selling, offering for sale, or disposing of newspapers, magazines, periodicals or any such printed matter from crying, calling attention to, hawking, advertising or proclaiming the same upon any street or sidewalk."

It thus plainly appears from the foregoing provisions that there was no intention on the part of the city to prevent by section 28.01 the free expression of thought in the city. The only thing sought to be accomplished is the prevention of littering the streets and the consequent danger to health, safety, and general welfare. It may be said that newspapers thrown on the street are as likely to cause evil effects as are handbills. However, a person who is interested enough in the contents of a newspaper or pamphlet to pay for the same will, almost without exception, carry it to his office or home instead of discarding it on the street.

The wisdom and necessity for this prohibition is primarily a matter for the determination of the Council of the City of Los Angeles. That determination will not be interfered with unless from an examination of the record this court can say that such determination by the City Council is without rational basis.

South Carolina State Highway Dept. v. Barnwell Bros. (1938), 303 U. S. 177, 192;

Pacific States Box & Basket Co. v. White (1935), 296 U. S. 176, 185;

Fifth Avenue Coach Co. v. City of New York (1911), 221 U. S. 467, 482;

Soon Hing v. Crowley (1885), 113 U. S. 703, 708.

There is nothing in the record which tends to show that the prohibition of the distribution of handbills and dodgers upon the public streets was not a reasonable exercise of discretion on the part of the City Council of the power of the City to "make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." (Cal. Const., Art. XI, Sec. 11.)

As stated by the court below in its opinion:

> "We do not subscribe to the doctrine that the city council could prohibit the distribution of handbills on the city streets in the absence of any public interest to be served by the prohibition, just because the streets are 'city' streets, under the council's charge; * * *." [R. 7.]

The lack of a showing of any arbitrary action or non-existence of a public purpose in adopting the ordinance is best summed up in the language of the opinion rendered in the court below:

> "Looking at the code before us, we cannot say that the city council had no reasonable cause for prohibiting the distribution of handbills on the sidewalks of the city, or that the city council acted arbitrarily in determining that some measure other than, or short of, such prohibition would not meet the needs reasonably well. Experience teaches that the immediate result of the indiscriminate distribution of handbills on public streets is the littering of those streets. Curiosity and courtesy would induce most persons to take one of the cards offered by appellant; a glance, and lack of further interest, would release it from the hand. Those who are charged by law with determining the public policy which shall govern, may well have seen the problem as it was stated in Anderson v. State, *supra*, 69 Neb. 686, 96 N. W. 149, 150, 5 Ann. Cas. 241, as quoted in City of Milwaukee v. Kassen, (1931) 203 Wis. 383, 234 N. W. 352, 353: 'The ordinance in question is manifestly a police regulation intended to further the public health and safety by preventing the accumulation of large quantities of waste paper upon the streets and alleys, which might occasion danger from fire, choke up and

obstruct gutters and catch-basins, and keep the streets in an unclean and filthy condition.' The evil against which the code appears to have been directed [fol. 16] is to be measured not merely by appellant's three hundred cards, but by the flood which might reasonably be expected if the code ceased to operate as a dike." [R. 7-8.]

Appellee believes that this Court can take judicial notice of the fact that the City of Los Angeles is, for the most part, built on a flat terrain so that the natural drainage of storm waters is inadequate. Long dry spells are prevalent, often followed by severe rains, resulting in a heavy flow of water onto the streets in the level portions of the city, to which is added the water from the hills located to the north and west of the main portion of the city. Adequate and efficient storm drains are essential to the health and safety of the inhabitants, and practically the entire county is included in a flood control district, to which has been recently added millions of dollars of drainage district improvements, which this Court had under consideration in *Chesebro v. Los Angeles County Flood Control Dist.* (1939), 306 U. S. 459. An uncontrolled distribution of papers of any kind on the streets is bound to result, more or less, in stoppage of storm drains, with the result that when such floods come serious injury will result.

Moreover, it would present an anomalous situation if municipal authorities could, in the interest of public health and safety and the general welfare, establish setback lines for buildings or require open areas on each lot

(*Gorieb v. Fox* [1927], 274 U. S. 603), or require that certain districts be restricted to residence purposes only (*Zahn v. Board of Public Works of the City of Los Angeles* [1927], 274 U. S. 325), or even prohibit the use of streets for advertisement purposes (*Fifth Avenue Coach Co. v. City of New York* (1911), 221 U. S. 467, 482), but be without power to adopt ordinances to prevent the streets of the community from being littered with trash.

A. Since Abridgment of Free Speech Is Not the End Sought to Be Attained by the Ordinance, Any Interference With Such Right Is Incidental and Does Not Make the Ordinance Void.

It cannot be seriously urged that it is beyond the power of a municipality to prevent the scattering of blank pieces of paper or the distribution of commercial advertisements in such manner as will result in littering the streets.

San Francisco Shopping News Co. v. City of South San Francisco (1934), [C. C. A. 8th] 69 Fed. (2d) 879, 892 (Cert. denied, 293 U. S. 606);

Sieroty v. City of Huntington Park (1931), 111 Cal. App. 377, 381 (Pet. for Hrg. by Supreme Court of Calif. denied, 111 Cal. App. 381);

People v. St. John (1930), [App. Dept. Superior Ct.] 108 Cal. App. 779, 784;

City of Milwaukee v. Kassen (1931), 203 Wis. 383, 384;

Almassi v. City of Newark (1930), 8 N. J. Misc. 420, 422, 150 Atl. 217, 218;

Com. v. Kimball (1938), [Mass.] 13 N. E. (2d) 18, 21.

See, also:

Lovell v. Griffin (1938), 303 U. S. 444, 451.

It is obvious that the effect of the distribution of handbills, dodgers, etc., on the streets will be substantially the same whether they contain printed matter of a commercial nature or political or religious matter. (*City of Milwaukee v. Kassen* (*supra*), 203 Wis. 383, 385.) It therefore follows that prohibiting the distribution of handbills, etc., to persons on the public streets, in order that the streets may be properly maintained, interferes only incidentally, if at all, with freedom of speech.

As pointed out in the opinion rendered in the court below, although an ordinance may operate as an abridgment of the right of free speech, the ordinance may still be valid if the abridgment is not the end sought by the ordinance but is merely incidental to the operation of the means reasonably adopted to attain a lawful end. [R. 7.]

This is but the application of the well-settled rule that a police regulation intended as such and not operating unreasonably beyond the occasion of its enactment is not rendered void or invalid by the fact that it may incidentally affect some right guaranteed by the Constitution, as, in effect, held in the opinion of Mr. Justice Roberts in the *Hague* case (83 Adv. Op. L. Ed., p. 937) in distinguishing it from the case of *Davis v. Massachusetts*, and as announced in *State v. Gibbes* (1933), 171 S. C. 209, 218, and *People v. Alterie* (1934), 356 Ill. 307, 309; see, also, *Francis v. People* (1926), (C. C. A. 3d), 11 Fed. (2d) 860, 865.

B. SINCE THE OBJECT OF THE ORDINANCE IS NOT CENSORSHIP OR THE RESTRICTION OF THE RIGHT OF FREE SPEECH, THE REASONABLENESS OF THE ORDINANCE IS NOT TO BE DETERMINED BY THE RULE OF "CLEAR AND PRESENT DANGER."

In *Herndon v. Lowry* (1937), 301 U. S. 242, this Court, speaking through Mr. Justice Roberts stated, at page 258, that:

> "The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. * * *"

This is the rule announced in the many decisions of this Court construing the constitutionality of statutes directed at sedition, criminal syndicalism and other acts aimed at the overthrow of organized government—statutes whose direct object is the curtailment of speech in the interest of the preservation of the government. To sustain a conviction under such a statute the words used must be used under circumstances and be of such a nature as to create a clear and present danger that they will bring about the situation which the states or the United States has a right to prevent. But there need be no clear and present danger to the government in order to uphold the validity of a statute which regulates or prohibits conduct generally in the interest of the public peace, health, safety, morals or the general welfare of the public. All that is required in order to sustain the validity of such a statute—and the ordinance in question is of this class—is that it bear a reasonable relation

to the public health, peace, safety, morals or general welfare.

As heretofore pointed out, the object of the ordinance involved in the case at bar is not to prevent the dissemination of knowledge, information or ideas, but simply to prevent the littering of the streets. This is clearly demonstrated by the express provision in subdivision (j) of section 42.00 (governing soliciting on the streets), that:

> "(j) Nothing in this section contained shall be applicable to or prohibit the sale or offering for sale or the possession, control or custody of newspapers, magazines, periodicals or printed matter commonly sold or disposed of by newsboys and news venders, or shall be applicable to or prohibit persons engaged in the selling, offering for sale, or disposing of newspapers, magazines, periodicals or any such printed matter from crying, calling attention to, hawking, advertising or proclaiming the same upon any street or sidewalk."

C. It Is Beside the Issue Whether Other Means Might Be Employed to Prevent the Littering of the City Streets.

That the same object might be accomplished by requiring the distributor to pick up handbills handed out by him and thereafter thrown upon the street, or by making it unlawful for any person to whom a handbill has been handed to throw it on the street, is wholly beside the point. Obviously, prosecution for the violation of such provisions would present practical difficulties that would make the securing of convictions almost impossible. This Court is not concerned with the relative adequacy, appro-

priateness, or practicability of the particular form of the regulation adopted in the public interest.

Nebbia v. New York (1934), 291 U. S. 502, 537;
New Orleans Public Service v. City of New Orleans (1930), 281 U. S. 682, 686;
Jones v. City of Portland (1917), 245 U. S. 217, 224.

Under the police power any practice which tends to endanger the health, safety or welfare of the public may be prevented.

Purity Extract Co. v. Lynch (1912), 226 U. S. 192, 201;
Hebe Co. v. Shaw (1919), 248 U. S. 297, 304;
Euclid v. Ambler Realty Co. (1926), 272 U. S. 365, 388;
Maxcy Inc. v. Mayo (1931), 103 Fla. 552, 577.

The same reason which warrants the enactment of laws for the prevention of epidemics or fires by prohibiting conditions which give rise to the danger applies with equal force to the prevention of conditions which give rise to the scattering of trash upon the public streets.

D. Since the Ordinance Is Not a Censorship Measure, It Is Not Subject to the Criticism Made of the Ordinances Involved in Hague v. C. I. O. and Lovell v. City of Griffin.

Appellee believes that it has been clearly demonstrated that the ordinance involved is not intended as a censorship measure nor has it, in fact, the effect of such a measure. Therein lies the distinction between the case at bar and *Hague v. Committee for Industrial Organization* (1939), 83 Adv. Op. L. Ed. 928, and *Lovell v. City of Griffin* (1938), 303 U. S. 444, relied on by appellant.

The distinction pointed out by Mr. Justice Roberts in the *Hague* case between the ordinance involved in that case and the one in *Davis v. Massachusetts*, 167 U. S. 43, is the feature which distinguishes the *Hague* case from the case at bar. As stated by Mr. Justice Roberts, at page 937 (83 Adv. Op. L. Ed. 928):

> "The ordinance there in question apparently had a different purpose from that of the one here challenged, for it was not directed solely at the exercise of the right of speech and assembly, but was addressed as well to other activities, not in the nature of civil rights, which doubtless might be regulated or prohibited as respects their enjoyment in parks. In the instant case the ordinance deals only with the exercise of the right of assembly for the purpose of communicating views entertained by speakers, and is not a general measure to promote the public convenience in the use of the streets or parks.
>
> "We have no occasion to determine whether, on the facts disclosed, the Davis Case was rightly decided, but we cannot agree that it rules the instant case. * * *"

Conversely, as the ordinance in the case at bar is not directed at the right of speech and assembly but at the proper regulation of the streets, the decision in the *Hague* case does not rule the case at bar.

In *Lovell v. City of Griffin* (*supra*), as stated by Mr. Chief Justice Hughes, "the ordinance in its broad sweep prohibits (without permission of the city manager) the distribution of 'circulars, handbooks, advertising or literature of any kind.' It manifestly applies to pamphlets, magazines and periodicals" (p. 450). "The ordinance prohibits the distribution of literature of any kind at any time, at any place, and in any manner without a permit

from the city manager". (p. 451). As pointed out by the Chief Justice, legislation of the type involved in the ordinance in that case "would restore the system of license and censorship in its baldest form" (p. 452). No limitation was placed upon the power of the city manager to refuse a license even though the matter sought to be circulated was not obscene, offensive to public morals and did not advocate unlawful conduct, and irrespective of whether the distribution be on the city streets or on private property. The vice of the ordinance as a means of unbridled censorship is also to be found in the ordinance involved in the *Hague* case.

The ordinance in the case at bar permits absolute freedom of expression by all means and in all places and without the necessity of obtaining any license except that handbills and dodgers may not be distributed on the public streets and that prohibition is absolute in the interest of the public welfare and not dependent upon the discretion of any executive official of the city.

The ordinance is a reasonable measure calculated to prevent the streets of the city from being littered with trash. The ordinance is not aimed at curtailing freedom of speech and any interference with such right is only incidental and innocuous in its effect upon the validity of the ordinance. The ordinance not being a censorship measure of the right of free speech, its reasonableness is not to be determined by the rule of "clear and present danger", nor by the rule laid down in the *Hague* case and in *Lovell v. Griffin*. That other means might have been employed to effect the desired object is wholly immaterial. It is therefore apparent that it is a valid ordinance and that a judgment of conviction for a violation of its provisions must be affirmed.

POINT III.

By Reason of the Nature of the Contents of the Handbill, Freedom of the Press Is Not Involved in This Case.

Even though freedom of the press be one of the liberties protected by the due process clause of the Fourteenth Amendment (*Grosjean v. American Press Co.* [1936], 297 U. S. 233, 244), freedom of the press is not involved in this case. As pointed out by the court below, in its opinion:

> "Whatever traffic in ideas the Friends Lincoln Brigade may have planned for the meeting, the cards themselves seem to fall within the classification of commercial advertising rather than the expression of one's views." [R. 11.]

In *Cooley's Constitutional Limitations* (7th Ed.), it is stated, with reference to liberty of speech and of the press, that (p. 604):

> "An examination of the controversies which have grown out of the repressive measures resorted to for the purpose of restraining the free expression of opinion will sufficiently indicate the purpose of the guaranties which have since been secured against such restraints in the future. Except so far as those guaranties relate to the mode of trial, and are designed to secure to every accused person the right to be judged by the opinion of a jury upon the criminality of his act, their purpose has evidently been to protect parties in the free publication of matters of public concern, to secure their right to a free discussion of public events and public measures, and to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in

> the exercise of the authority which the people have conferred upon them. To guard against repressive measures by the several departments of the government, by means of which persons in power might secure themselves and their favorites from just scrutiny and condemnation, was the general purpose; * * *"

The handbill or card involved in the case at bar does not relate to any of the matters embraced within the concept of freedom of the press. Appellant's reliance upon freedom of the press is similar to the position taken by the appellant in *Mutual Film Corp. v. Industrial Commission* (1915), 236 U. S. 230, wherein it was urged that there could be no censorship of motion picture films as it would be an interference with the freedom of the press. This Court, however, pointed out that appellant's business is not embraced within the concept of freedom of the press. Since freedom of the press is not shown by the record to be involved, the question need not be discussed. As stated by this Court in *Associated Press v. National Labor Relations Board* (1937), 301 U. S. 103, 132:

> "Courts deal with cases upon the basis of the facts disclosed, never with nonexistent and assumed circumstances."

Since the record shows that the handbills or cards were in the nature of commercial advertisements, the question resolves itself into the right of the municipality in the reasonable exercise of the police power to prohibit using the streets for advertising purposes—a right which this Court has held to be possessed by municipalities. (*Fifth Avenue Coach Co. v. City of New York* [1911], 221 U. S. 467, 482.)

Conclusion.

Since appellant is not deprived of his liberty of action, including that of freedom of speech, without due process of law by a statute enacted under the police power of the state in the interest of the health, safety or general welfare of the public, and since the ordinance which appellant was convicted of violating is a reasonable exercise of that power of the state, it follows that there has been no violation of appellant's right of free speech or liberty of the press, and that appellant's acts were of such nature as to be within the police power of the state to prohibit.

It is respectfully submitted that the judgment of the Appellate Department of the Superior Court should be affirmed.

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